UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

In re:	:	
THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,	:	PROMESA Title III
as representative of	:	Case No. 17-BK-03283 (LTS)
THE COMMONWEALTH OF PUERTO RICO, *et al.,*	:	(Jointly Administered)
Debtors.[1]	:	
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF THE COMMONWEALTH OF PUERTO RICO,	:	Adv. Proc. No. 17-00257 (LTS)
as agent of	:	
THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,	:	
as representative of	:	
THE COMMONWEALTH OF PUERTO RICO,	:	
Plaintiff,	:	
v.	:	
BETTINA WHYTE,	:	
as agent of	:	
THE FINANCIAL OVERSIGHT AND MANAGEMENT	:	

[1] The Debtors in these title III cases, along with each Debtor's respective title III case number listed as a bankruptcy case number due to software limitations and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17-BK-3283 (LTS)) (Last Four Digits of Federal Tax ID: 3481), (ii) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17-BK-3566 (LTS)) (Last Four Digits of Federal Tax ID: 9686), (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17-BK-3567 (LTS)) (Last Four Digits of Federal Tax ID: 3808), (iv) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17-BK-3284 (LTS)) (Last Four Digits of Federal Tax ID: 8474), and (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17-4780 (LTS)) (Last Four Digits of Federal Tax ID: 3747).

BOARD FOR PUERTO RICO, as representative of THE PUERTO RICO SALES TAX FINANCING CORPORATION, Defendant.	:

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OMNIBUS OBJECTION OF COMMONWEALTH AGENT TO (A) COFINA AGENT'S MOTION TO CERTIFY QUESTIONS UNDER PUERTO RICO LAW TO THE SUPREME COURT OF PUERTO RICO [DOCKET NO. 329]; (B) MUTUAL FUND GROUP AND PUERTO RICO FUNDS' MOTION TO CERTIFY QUESTIONS OF LAW TO THE SUPREME COURT OF PUERTO RICO [DOCKET NO. 331]; (C) STATEMENT OF THE COFINA SENIOR BONDHOLDERS' COALITION IN SUPPORT OF, AND JOINDER TO, THE MOTION OF THE COFINA AGENT TO CERTIFY QUESTIONS UNDER PUERTO RICO LAW TO SUPREME COURT OF PUERTO RICO [DOCKET NO. 332]; AND (D) AMBAC ASSURANCE CORPORATION AND NATIONAL PUBLIC FINANCE CORPORATION'S (I) LIMITED OBJECTION TO MOTION OF COFINA AGENT TO CERTIFY QUESTIONS TO THE SUPREME COURT OF PUERTO RICO AND (II) CROSS-MOTION, IN THE ALTERNATIVE, TO CERTIFY ALTERNATIVE QUESTIONS TO THE SUPREME COURT OF PUERTO RICO [DOCKET NO. 421]

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To the Honorable United States District Court Judge Laura Taylor Swain:

The Official Committee of Unsecured Creditors of all title III Debtors (other than COFINA), as the "Commonwealth Agent" with respect to the "Commonwealth-COFINA Dispute," as defined in the *Stipulation and Order Approving Procedure to Resolve Commonwealth-COFINA Dispute*, dated August 10, 2017 [Docket No. 996 in Case No. 17-03283 (LTS)] (the "Commonwealth-COFINA Dispute Stipulation"), hereby files this omnibus objection (the "Objection") to (a) the *Motion and Incorporated Memorandum of Law of the COFINA Agent to Certify Questions Under Puerto Rico Law to the Supreme Court of Puerto Rico*, dated February 26, 2018 [Docket No. 329 in Adv. Proc. No. 17-00257 (LTS)], (b) the *Mutual Fund Group and Puerto Rico Funds' Motion to Certify Questions of Law to the Supreme Court of Puerto Rico*, dated February 26, 2018 [Docket No. 331 in Adv. Proc. No. 17-00257 (LTS)]; (c) the *Statement of the COFINA Senior Bondholders' Coalition in Support of, and Joinder to, the Motion of the COFINA Agent to Certify Questions Under Puerto Rico Law to the Supreme Court of Puerto Rico*, dated February 26, 2018 [Docket No. 332 in Adv. Proc. No. 17-00257 (LTS)]; and (d) *AMBAC Assurance Corporation and National Public Finance Corporation's (i) Limited Objection to Motion of COFINA Agent to Certify Questions to the Supreme Court of Puerto Rico and (ii) Cross-Motion, in the Alternative, to Certify Alternative Questions to the Supreme Court of Puerto Rico*, dated April 3, 2018 [Docket No. 421 in Adv. Proc. No. 17-00257 (LTS)] (collectively, the "Certification Motions"). In support of this Objection, the Commonwealth Agent respectfully states as follows:

PRELIMINARY STATEMENT

1. Just six months ago, the COFINA Agent told this court that the entire COFINA-Commonwealth dispute "should be—and will be—resolved by th[is] Court."[2] Acting on that representation, the COFINA Agent then asked this court for summary judgment on that dispute.

2. Apparently, the COFINA Agent has had a dramatic, last minute change of heart. She and the COFINA Senior Bondholders' Coalition, the Mutual Fund Group, the Puerto Rico Funds and, with a bit more ambivalence, AMBAC Assurance Corporation ("AMBAC") and National Public Finance Corporation ("NPFC") (collectively, the "Movants") have now asked this court to duck several questions raised by their dispute with the Commonwealth Agent, and, by extension, questions that are critical to the COFINA and Commonwealth title III cases. More specifically, they have asked this court to subcontract the important work of resolving certain questions posed in this Adversary Proceeding to the Supreme Court of Puerto Rico. Those questions, however, do not meet the standards for certification established by Puerto Rico Supreme Court Rule 25[3] on certification or by the applicable federal law, and the Certification Motions should be denied on that basis, among others. As explained below:

- The court has already expressed its views with regard to the questions posed by the Certification Motions. Almost a year ago, other litigants sought to certify some of the same local law questions at issue here to the Supreme Court of Puerto Rico, and this court properly rejected that request, concluding, among other things, that "[t]he interests of judicial economy do not favor piecemeal litigation of issues that are central to these Title III proceedings in a variety of

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[2] *Objection of Bettina M. Whyte, in her Capacity as Agent for the Puerto Rico Sales Tax Financing Corporation to the Motions of Official Committee of Unsecured Creditors, in its Capacity as Agent for Commonwealth of Puerto Rico (1) for Leave to Intervene under 11 U.S.C §1109(b) and/or Bankruptcy Rule 7024 and (2) For Clarification of May 30, 2017 Interpleader Order* at 5 [Docket No. 375 in Adv. Proc. No. 17-00133 (LTS)] (the "COFINA Agent's Objection to Leave to Intervene").

[3] Rules of the Supreme Court of Puerto Rico (2011) (available at http://www.ramajudicial.pr/leyes/supremo/Reglamento-Tribunal-Supremo.pdf; last visited on Apr. 11, 2018). The Supreme Court's Rules are posted in Spanish; a certified translation of Rule 25 is appended as an exhibit to the Opposition brief filed today by the Oversight Board.

courts, [and that the court] is fully capable of engaging [issues of Puerto Rico law] in an appropriate manner at an appropriate time . . . ."[4]

- Certification makes even less sense now, almost a year later. The summary judgment motions in this matter have been fully briefed and argued, including the local law issues Movants seek to certify, and those motions are ready for this court to decide whenever this court deems it appropriate. Moreover, as past history with the certification procedure has shown, deferring these questions to the Supreme Court of Puerto Rico (if it accepts them) could take two years or more. While the parties and this court are waiting, a resolution to the balance of the parties' dispute would be impossible, as would important aspects of the title III cases more broadly. This court is aware of the significant judicial and parties resources already expended in this Adversary Proceeding; adding to that expense serves no one's legitimate interests.

- Even if this court were to grant the Certification Motions, the Supreme Court of Puerto Rico is unlikely to accept the case, making this detour a complete waste of time and effort. Supreme Court Rule 25 prohibits that court from accepting a certified case from a federal court where the litigation giving rise to the certification raises both questions of federal law and aspects Puerto Rico's local law if the federal questions "must be resolved by the requesting [federal] court" after the certified questions have been answered. That is precisely the posture of this case.

- Even if the Supreme Court of Puerto Rico were to accept the certification and give definitive answers to the local law questions involved, federal law, not local law, defines what constitutes the property of the debtor, and in applying that federal law, bankruptcy courts are not bound by the "label that state law affixes to a particular interest." *In re The Ground Round, Inc.*, 482 F.3d 15, 17 (1st Cir. 2007) (as modified). Any answers the Supreme Court of Puerto Rico might give would be, at most, advisory; the **federal** questions posed here would be waiting for this court to resolve after any such decision. That makes certification unwarranted, since the procedure is available only where an answer to the certified question will "terminate[] the entire dispute" between the parties. *Collazo-Santiago v. Toyota Motor Corp.*, 937 F. Supp. 134, 138 & n.2 (D.P.R. 1996) (Supreme Court of Puerto Rico "added a finality requirement" to certification analysis; court should certify "only when it lacks confidence in the accuracy of its prediction" about the correct outcome), *aff'd*, 149 F.3d 23 (1st Cir. 1998).

- Certification is warranted when the issues involved are likely to recur, and a definitive answer by the Supreme Court of Puerto Rico will "clarify the [local] law for future litigants."[5] That is not the case here. Indeed, it is difficult if not

[4] *See* Transcript from June 28, 2017 Hearing ("June 28, 2017 Hr'g Tr.") at 75–77.

[5] *Watchtower Bible Tract Soc'y of New York, Inc. v. Municipality of Santa Isabel*, No. CIV. 04-1452 GAG, 2013 WL 2554879, at *1 (D.P.R. June 11, 2013)

impossible to imagine the local law questions posed by Movants arising again, since all the parties who likely would have standing to raise these questions are before this court now.

3. The Certification Motions largely ignore the relevant factors, or mention them only in passing. There is almost nothing in the Certification Motions to recommend a detour to the Supreme Court of Puerto Rico, and there is a number of reasons to deny certification that go unmentioned altogether by the Certification Motions.

STANDARD APPLICABLE TO CERTIFICATION MOTIONS

4. Tellingly, the standard applicable to the Certification Motions is not mentioned by the COFINA Agent or by those joining her motion. This court is not required to certify a matter to the Supreme Court of Puerto Rico simply because an unresolved question of local law is presented, as the Movants suggest. Rather, the decision whether to certify a question is committed to this court's sole discretion.[6] And because certification would result in both an abdication of jurisdiction by this court and an imposition on the Supreme Court of Puerto Rico, the court must exercise its discretion "with circumspection." *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 671-72 (7th Cir. 2001) (denying certification to Indiana Supreme Court, emphasizing "respect for the burdens of our colleagues on the state bench and concern for the litigants before us").

5. As a general rule, federal courts have an obligation to exercise the jurisdiction they are given by the United States Constitution, even where "the answers to the questions of state law [before them] are difficult or uncertain or have not yet been given by the highest court

[6] "The decision whether to certify a state law issue to the state's high court 'in a given case rests in the sound discretion of the federal court.'" *Fischer v. Bar Harbor Banking & Tr. Co*., 857 F.2d 4, 7 (1st Cir. 1988) (district court's denial of certification to Maine Supreme Court was not abuse of discretion; even without definitive guidance from state court of last resort, "a federal court may consider 'analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand" (internal citations omitted)); *see also Diaz v. Jiten Hotel Mgmt., Inc.*, 671 F.3d 78, 84 (1st Cir. 2012) (abuse of discretion review of decision to deny certification to Massachusetts Supreme Judicial Court).

of the state . . . ." *Meredith v. City of Winter Haven*, 320 U.S. 228, 234–35 (1943) (*Pullman* abstention case).[7] As the Fifth Circuit has stated:

> [C]ertification should never be automatic or unthinking. [Courts must] use much judgment, restraint and discretion in certifying. [They should] not abdicate [their jurisdiction lightly]. In determining whether to exercise [its] discretion in favor of certification, [a federal court should] consider many factors. The most important are the closeness of the question and the existence of sufficient sources of state law . . . to allow a principled rather than [a] conjectural conclusion [by the federal court]. But also to be considered is the degree to which considerations of comity are relevant . . . . And [the court] must also take into account practical limitations of the certification process.

Escareno v. Noltina Crucible & Refractory Corp., 139 F.3d 1456, 1461 (11th Cir. 1998) (citing with approval *State of Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 274 (5th Cir. 1976)). In this instance, as explained below, "certification to the Supreme Court of Puerto Rico would likely inhibit, rather than further, the efficient administration of justice." *Nat'l Pharmacies, Inc. v. Feliciano-de-Melecio*, 221 F.3d 235, 241 (1st Cir. 2000).

ARGUMENT

I. This Court Has Previously Stated That Certification of Local Law Questions Unwarranted on Similar Facts

6. The Certification Motions raise no issues this court has not already addressed. Last June, two of the Movants here (the Puerto Rico Funds and Mutual Fund Group) asked this court to lift the automatic stay arising from these title III cases so that they could pursue

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[7] *See also Lehman Bros. v. Schein*, 416 U.S. 386, 393 (1974) (Rehnquist J. concurring) (in context of certification request, "a federal court may not remit a [question] to state courts merely because of the difficulty in ascertaining local law"); *Compass Bank v. King, Griffin & Adamson P.C.*, 388 F.3d 504, 505 (5th Cir. 2004) ("[w]hile certifying the question would be 'determinative' in the sense that it would resolve the case, 'we do not use certification as a panacea for resolution of those complex or difficult state law questions which have not been answered by the highest court of the state'") (quoting *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 487 (5th Cir. 2003) (also denying certification) (quotations omitted))); *Copier By & Through Lindsey v. Smith & Wesson Corp.*, 138 F.3d 833, 838 (10th Cir. 1998) (refusing to certify question to state Supreme Court; "the federal courts have the duty to decide questions of state law even if difficult or uncertain"); *cf Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (federal court has a "virtually unflagging obligation . . . to exercise the jurisdiction given them") (*Pullman* abstention case).

certification of state law questions regarding the COFINA-Commonwealth dispute posed in *Lex Claims, LLC v. Alejandro Garcia Padilla, et al*. No. 16-02374 (FAB) (D.P.R. 2016). More specifically, these two groups told the court that they intended to ask the Supreme Court of Puerto Rico to resolve the very local law questions posed here (*i.e.*, "[w]hether [the SUT tax revenues] are property of COFINA or available resources of the Commonwealth"). *See Puerto Rico Funds and Mutual Fund Group's Motion for Relief from Automatic Stay* at 8 [Docket No. 270 in Case No. 17-03283 (LTS)].

7. Multiple parties objected to the effort. One objector, in particular, offered compelling grounds for denying the requested relief: "a complete resolution of the Commonwealth-COFINA Dispute may be achieved in this Court without the need for a decision by" the Supreme Court of Puerto Rico. "This Court has jurisdiction over all of the Debtors' property," this party explained, and the "[p]roperty of the debtor includes the Commonwealth's legal claims against COFINA."

8. That cogent analysis was offered in *Lex Claims* by the COFINA Senior Bondholder's Coalition, which **seeks** certification here. *See Objection of the COFINA Senior Bondholders' Coalition to the Puerto Rico Funds and Mutual Fund Group's Motion for Relief From the Automatic Stay* at 11 [Docket No. 406 in Case No. 17-03283 (LTS)]. The Senior Bondholders' Coalition had it right in the *Lex Claims* matter, but has since forgotten the lessons of that proceeding.

9. This court properly agreed with the Senior Bondholders' Coalition in *Lex Claims* and refused to lift the stay to allow for certification of these issues. The reasons it gave in support of that ruling apply today with equal force. The court explained that "[t]he interests of judicial economy do not favor piecemeal litigation of issues that are central to these Title III

proceedings in a variety of courts, [the court was] fully capable of engaging [issues of Puerto Rico law] in an appropriate manner at an appropriate time, [and the issue identified by the parties was one] that certainly arguably, and possibly likely, involves the interplay of federal law, namely PROMESA, and provisions of the Puerto Rico Constitution," a mixture of issues that likely would preclude the Supreme Court of Puerto Rico from accepting any certification even if the stay were lifted. *See* June 28, 2017 H'rg Tr. at 75–77.

10. Thus, there is nothing new here for the court to decide. It has already weighed the factors it must consider in deciding whether certification makes sense, and it did so almost a year ago, **before** the parties had expended the time and effort necessary to present these very same issues to the court on summary judgment. Certification made little sense last June; it makes much less sense now, as explained below.

II. Certification Would Be a Waste of Party and Judicial Resources

11. "Certification is meant to save time, energy and resources." *Cintron v. United States*, 991 F. Supp. 41, 44 n.3 (D.P.R. 1998) (denying motion to certify despite existence of conflicting local case law on point); *City of Rome v. Hotels.com, L.P.*, 549 F. App'x 896, 904 (11th Cir. 2013) (court has discretion to deny certification based on "practical limitation[s] of the certification process.") (quoting *Escareno*, 139 F.3d at 1461). Although certifying local law questions can provide helpful guidance for federal courts in some circumstances, the process "is, by its very nature, a cumbersome and time-consuming [one] that stops a case in its tracks, multiplies the work of the attorneys, and sharply increases the costs of litigation." *In re Citigroup, Inc., Capital Accumulation Plan Litig.*, 652 F.3d 88, 93 (1st Cir. 2011) (internal quotations omitted) (court "decline[d] to exercise [its] discretion to certify any questions of state law to the supreme courts of Colorado and Louisiana" even though those courts had "not

addressed the precise questions before" court). When exercising its discretion, this court is obliged to keep this fact in mind.

12. *Hatfield v. Bishop Clarkson Mem'l Hosp.*, 679 F.2d 1258, 1261 (8th Cir. 1982), *on reh'g sub nom. Hatfield, by Hatfield v. Bishop Clarkson Mem'l Hosp.*, 701 F.2d 1266 (8th Cir. 1983), is a useful example. There, the Eighth Circuit refused to certify a novel state-law question to the Nebraska Supreme Court regarding a state statute of limitations. It explained the factors that counseled against "refer[ring] th[e] issue to the state supreme court:"

> First, our court is now ready to decide this case. The parties have fully briefed the issue and orally argued it before the court. We believe we have sufficient resources to make a principled decision. Second, our decision in this case does not seriously invade the state's sphere of sovereignty. If the state supreme court ultimately faces the issue and resolves it contrary to our decision, our holding will only have relevance to the parties to this case. Third, certification would entail significant delay . . . because of the crowded docket of the state supreme court. We do not believe the parties to this case should be required to experience such delay . . . . If the issue was certified, the parties would then be given time to brief the case before the supreme court; they would then have to await calendaring for oral argument and decision. This could delay the progress of the case for months and possibly over a year.

Id. at 1261-62 & n.4. Every feature of *Hatfield* that counseled against certification is present here as well.

13. *First*, by the time these Motions to certify can be considered by this court, the "court [will also be] ready to decide" the pending motions for summary judgment, which address the very issues Movants ask to certify. If the court decides those issues, rather than off-loads them, final decisions on the dispositive motions will come precisely when the court is ready for them.[8] If the court certifies the questions, it abdicates control over its docket.

[8] Even "[b]efore [the] discretionary decision [to certify] is even considered, [this court would first be obligated to] undertake [its] own prediction of state law for [it] may conclude that 'the course [the] state court[] would

14. *Second*, neither "the parties to this case [nor the parties interested in the related title III cases] should be required to experience [the] delay" that will inevitably result from the certification procedure. Rather, the parties have a right to expect a "speedy . . . determination [in this] proceeding."[9]

15. An extended delay is inevitable "because of the crowded docket of the [Puerto Rico] supreme court . . . . If the issue[s] [are] certified [by this court], the parties [would have to await the Supreme Court's decision whether to accept the certification, then] would then be given time to brief the case before the supreme court; they would then have to await calendaring . . . and decision. This could delay the progress of the case for months and possibly over a year." *Hatfield*, 679 F.2d at 1261-62 & n.4.

16. Indeed, the last two cases in which the Supreme Court of Puerto Rico decided issues on certified questions resulted in delays of fifteen (15)[10] and twenty-six (26)[11] months respectively. During the year or two it might take for the Supreme Court to answer the local law questions posed here—if that court even decides to accept them (*see* Section III below)—a major aspect of the COFINA and Commonwealth title III cases would effectively be held in abeyance and the court's other crucial work on these cases would be impeded.

17. *Third,* as discussed in greater detail below, a ruling by this court on the local law questions will not materially intrude on the sovereignty of Puerto Rico. It seems unlikely that

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take is reasonably clear.'" *Nieves v. Univ. of Puerto Rico*, 7 F.3d 270, 274–75 (1st Cir. 1993) (quoting *Porter v. Nutter*, 913 F.2d 37, 41 n.4 (1st Cir. 1990)) (refusing to certify question to Puerto Rico Supreme Court). That is, before it could certify questions to the Supreme Court of Puerto Rico, this court would have to do most of the work involved in answering those questions.

[9] Fed. R. Bankr. 1001.

[10] *Quilez-Velar v Ox Bodies*, 2017 TSPR 165 (certified by First Circuit on May 9th, 2016, decided on Aug. 31, 2017).

[11] *Gonzalez-Caban v JR Seafood*, 2017 TSPR 187 (certified by district court on Sept. 11, 2015, decided on Dec. 1, 2017).

these issues will ever arise again between other litigants, *see* Section IV below, but even if they do, and the Supreme Court of Puerto Rico "ultimately faces the issue[s] [again] and resolves [them] contrary to [this court's] decision, [this court's] holding will only have relevance to the parties to this case." *Hatfield*, 679 F.2d at 1261-62 & n.4.

18. *Fourth*, this court has "sufficient resources to make a principled decision," as this court has already decided. *See* June 28, 2017 H'rg Tr. at 75–77 (court is "fully capable of engaging [these issues of Puerto Rico law] in an appropriate manner at an appropriate time"). Indeed, no other court is so intimately familiar with the parties, the dispute, the relevant questions, and the role the presented issues will play in this matter and in the larger title III context. The Supreme Court of Puerto Rico does not have, and given the certification process outlined in Rule 25, would have no occasion to develop, this sort of intimate understanding of the matter in a limited proceeding on certified questions.

19. Movants cannot credibly claim otherwise. They **stipulated** to this proceeding (in the case of the COFINA Agent, through her principal, the Oversight Board), and they then moved this court for summary judgment. Had they believed that this court was incompetent to make a careful and reasoned decision on these questions, they could have—and should have—refused to sign the stipulation, and instead asked for certification at the outset, when duplicative effort and wasted time might have been minimized.[12] Having stipulated to this proceeding and waited until the very last minute to move for certification, Movants have ensured that certification would be as wasteful as possible, and would impose the most significant obstruction to the court's other urgent business.

[12] It is true, of course, that the Movants reserved the right to seek certification of questions in the Supreme Court of Puerto Rico in the stipulation, but that was long before they effectively waived that right by proceeding to the merits of the matter before **this** court by filing their motions for summary judgment.

20. Although some litigants undoubtedly seek certification for reasons connected to federalism and comity, or with a concern for the coherent development of local law, those altruistic motives are altogether absent here. Movants' request is nothing but a naked hedge against a potential poor result on summary judgment.

21. This observation is not merely the Commonwealth Agent's partisan speculation; the Senior Bondholders, AMBAC, and NPFC have admitted the fact explicitly. All have asked the court to certify the local law questions **only if** their summary judgment motion is at risk of being denied. Senior Bondholders' Statement at 3 [Docket No. 332 in Adv. Proc. No. 17-00257 (LTS)] (seeking certification "*only as an alternative* . . . should the Court deny [the Bondholders'] Motion for Summary Judgment") (emphasis in original); Cross-Motion of AMBAC and NPFC at 3, 7 [Docket No. 421 in Adv. Proc. No. 17-00257 (LTS)] (seeking certification only if the court finds its position "seriously in question"). The First Circuit has expressly, and rightly, condemned precisely this sort of results-driven gamesmanship in the certification context. *Cantwell v. Univ. of Massachusetts*, 551 F.2d 879, 880 (1st Cir. 1977) (declining certification to Massachusetts Supreme Court, and noting that the court does "not look favorably, either on trying to take two bites at the cherry by applying to the state court after failing to persuade the federal court, or on duplicating judicial effort").

III. Answers to Questions Posed by Movants Will Not Terminate Entire Dispute and Thus Are Not Appropriate for Certification

22. The certification procedure of the Supreme Court of Puerto Rico is available only where an answer to the certified question will "terminate[] the entire dispute." *Collazo-Santiago*, 937 F. Supp. at 138 n.2 (D.P.R. 1996) (discussing "finality requirement" for certification under Puerto Rico Supreme Court standards). Even where "the question before the Court is [an unsettled] question of Puerto Rico law, [where] its resolution will not determine the outcome of

the case . . . it [is] doubtful that the Supreme Court would accept certification in [the] case." *Id.* at 138; *see also Watchtower Bible Tract Soc'y*, 2013 WL 2554879, at *1 (federal court certification appropriate because "disposition of [the certified] issue will resolve all further proceedings in front of this court [and result in a] final disposition of this matter"). More particularly, Puerto Rico Supreme Court Rule 25 **prohibits** that court from accepting certified local law questions from this court if the answers it provides will merely facilitate the federal court's eventual resolution of **federal** issues in the case. *See* Rule 25(b).

23. This case is thus not eligible for certification because the determinations this court must ultimately make about the COFINA dispute also concern **federal**, and not only **local**, law, and, for this reason, the local law answers the parties might have received from the Supreme Court of Puerto Rico would not terminate the dispute between the parties.

A. The Question Whether Some Portion of the SUT Revenues Forms Part of Commonwealth's Property Requires Considerations of Federal Law

24. Federal law, not only local law, will determine what constitutes the property of the estate (or property of the debtor),[13] and, in applying that federal law, courts are not bound by the label that state law affixes to a particular interest. *In re Nejberger*, 934 F.2d 1300, 1302 (3d Cir. 1991) (although liquor license was not "property" subject to a security interest filed in accordance with state law, it was nevertheless "property" under federal bankruptcy law), *cited with approval in In re The Ground Round, Inc.*, 482 F.3d at 17. "[T]he ultimate question whether an interest . . . created and defined [by state law] falls within a category stated by a

[13] Section 301(c)(5) of PROMESA provides that the term "property of the estate," when used in a section of the Bankruptcy Code made applicable to PROMESA, means property of the debtor. 48 U.S.C. § 2161. For example, section 1123(a)(5) of the Bankruptcy Code (which is incorporated into PROMESA) lists the various ways "property of the estate" can be used in a plan. 11 U.S.C. § 1123(a)(5) Pursuant to section 301(c)(5) of PROMESA, the phrase property of the estate in section 1123(a)(5) means property of the debtor—and whether any particular asset constitutes "property of the debtor" subject to treatment under a plan is interpreted by federal law.

Federal statute, requires an interpretation of [the bankruptcy] statute which is a Federal question.'" *Nejberger*, 934 F.2d at 1302 (internal citation omitted).[14]

25. For example, in *In re Colonial Realty Inv. Co.*, 516 F.2d 154, 158 (1st Cir. 1975), the First Circuit considered whether the trustee had the right to take possession of the debtor's property then in possession of a mortgagee. The court rejected the argument that it lacked jurisdiction over that property even though state law held that the mortgagee was the legal owner of the property (and therefore, arguably, the mortgaged property was not "property of the debtor"). In reaching this conclusion, the First Circuit emphasized that the bankruptcy court's **federal** jurisdiction could not "be impeded by the idiosyncrasies of local property laws." *Id.*[15]

26. Thus, while a bankruptcy court can, and often will, take into account the characteristics of an asset as defined by state law in exercising its bankruptcy powers, the question whether the property is properly characterized as the property of the estate is ultimately and exclusively a matter of **federal** law. *See In re Burgess*, 234 B.R. 793, 797 (D. Nev. 1999) ("while state law creates the right, federal law determines whether it is 'property' for purposes of the federal bankruptcy laws, tax laws, etc."). This is true "regardless of how the state characterizes the actual legal ownership of the property." *In re Chardon, LLC,* 519 B.R. 211, 217 (Bankr. N.D. Ill. 2014) (quoting *Matter of Pentell*, 777 F.2d 1281, 1284 n.2 (7th Cir. 1985),

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[14] *See also Soto-Rios v. Banco Popular de Puerto Rico*, 662 F.3d 112, 117 (1st Cir. 2011) (phrase "'interest in property' under sections 362(b)(3) and 546(b)(1)(A) is a federal statutory term, and the meaning of language under the Bankruptcy Code is a matter of federal law") (as modified); *In re 229 Main St. Ltd. P'ship*, 262 F.3d 1, 6–7 (1st Cir. 2001) (interpreting section 362(b)(3) and holding that the "fact that 'interest in property' and 'lien' may be synonymous under the law of a particular state or under a particular state statute does not render the terms coextensive for purposes of the Bankruptcy Code").

[15] Similarly, the Sixth Circuit Court of Appeals has explained that "[a]lthough it is true that the state has the right to decide what property interests it wishes to create, it cannot thwart the operation of the Tax Code by classifying the interests is has created as something other than property rights." *In re Terwilliger's Catering Plus, Inc.*, 911 F.2d 1168, 1171-72 (6th Cir. 1990) (holding that liquor license was property of bankruptcy estate and was subject to federal tax lien).

and holding that asset was property of debtor notwithstanding state law where "the key elements of ownership are clearly placed with" debtor).[16]

27. Thus, even if the Supreme Court of Puerto Rico were to agree to answer the questions Movants pose, and even if that court were to determine that SUT revenues that are not yet in existence (and perhaps may never exist) nonetheless became the sole property of COFINA a decade ago **as a matter local law**, that determination would be the **beginning** of the court's work, not the end, and the balance of the work before the court would be questions of **federal** law, not the law of Puerto Rico. Under those circumstances, certification is not warranted. *See Nat'l Pharmacies, Inc.*, 221 F.3d at 241 (declining certification, and noting that "[a]lthough a statutory interpretation by the highest local court could have facilitated the district court's analysis, it would not have been dispositive of National's lawsuit, which was premised on federal constitutional claims").

B. Supreme Court of Puerto Rico Will Not Accept Certified Questions When Answering Them Will Not Resolve Entire Dispute

28. The preceding section identifies substantive federal questions that would remain after the disposition of the Supreme Court of Puerto Rico even if Movants prevailed there. The existence of those federal questions precludes certification. As noted above, Supreme Rule 25

[16] *See Board of Trade of City of Chicago v. Johnson*, 264 U.S. 1 (1924) (seat on Chicago Board of Trade was property of bankrupt's estate even though state law did not recognize holder of seat as having a property interest); *In re Nejberger*, 934 F.2d at 1302 ("ultimate question whether an interest . . . falls within a category stated by a Federal statute, requires an interpretation of that statute, which is a Federal question" and "label, however, that state law affixes to a particular interest in certain contexts is not always dispositive"); *In re Terwilliger's Catering Plus, Inc.*, 911 F.2d at1172 ("While the nature and extent of the debtor's interest are determined by state law 'once that determination is made, federal bankruptcy law dictates to what extent that interest is property of the estate.'") (quoting *In re N.S. Garrott & Sons*, 772 F.2d 462, 466 (8th Cir. 1985)); *Matter of Gladstone Glen*, 628 F.2d 1015, 1017 (7th Cir. 1980) (answering in the affirmative "whether a person, who under state law, is considered to have neither legal nor equitable title to real property may, for purposes of federal law, be regarded as the realty's 'legal or equitable owner'"); *In re Commodore Bus. Machs., Inc.*, 180 B.R. 72, 78 n.8 (Bankr. S.D.N.Y. 1995) ("Once the nature and extent of debtor's interest in the property is determined, federal bankruptcy law dictates the extent to which the property is property of the estate."); *In re Burgess*, 234 B.R. at 798 ("regardless of how the issuing state characterizes such licenses, most courts have held that they are property under the bankruptcy laws").

only allows for certification when the questions at issue will "determine the outcome" of the "judicial matter" pending in federal court, and then only if the matter does not also "involve[] aspects of federal law . . . which [would have to] be resolved by the requesting court" after the local law questions have been answered. Because this court would still be obliged to decide, as a matter of **federal** law, how the COFINA revenue stream should be treated in the title III cases, the Supreme Court of Puerto Rico would be **prohibited** by Rule 25 from answering the local law questions that Movants want to certify. *See Cintron*, 991 F. Supp. at 44 n.3 (Supreme Court of Puerto Rico "will only answer questions which are determinant to the cause of action;" it would not accept certification of the question because "neither [possible] answer [to the certified question] would be determinant. Either way the case would have to be reverted to [federal] Court for further proceedings.").

IV. Answers Given by This Court to Questions at Issue Are Unlikely to Recur for Future Litigants

29. The "certification [of a state law question] is not appropriate where . . . the question is not one which arises frequently." *Brown v. Argosy Gaming Co., L.P.*, 384 F.3d 413, 418 (7th Cir. 2004). Conversely, certification is more likely to be warranted where "the problem will doubtless recur." *Brown v. Crown Equip. Corp.*, 501 F.3d 75, 79 (1st Cir. 2007), *certified question answered,* 2008 ME 186, 960 A.2d 1188 (Me. 2011); *Tunick v. Safir*, 209 F.3d 67, 81 (2d Cir. 2000) (certification is appropriate where there is a strong "likelihood that the question will recur"); *Hanlon v. Town of Milton*, 186 F.3d 831, 835 (7th Cir. 1999) (certification proper where "future litigants have a real and substantial interest" in settled law on certified question), *certified question answered*, 2000 WI 61, 235 Wis. 2d 597, 612 N.W.2d 44186 (2000); *Watchtower Bible Tract Soc'y*, 2013 WL 2554879, at *1 (certification appropriate where doing so will "clarify the law for future litigants").

30. This case is firmly in the former category, not the latter. It is difficult to imagine a circumstance in which the questions listed by the COFINA side will arise again in any context. This proceeding involves all of the entities that might have standing to raise the questions posed.

31. In any event, if some currently unimaginable set of circumstances were to arise at some point in the future that might require a court to answer these questions again, the court's holding here would not serve as an impediment to those hypothetical future litigants. They could take their dispute to the Commonwealth courts and, ultimately, to the Supreme Court of Puerto Rico, which could embrace, reject, or ignore this court's decision altogether. A decision in this dispute, by this court, would bind only the parties to this Adversary Proceeding.

V. It Is Unclear Whether Committee Has Authority to Litigate on Behalf of Oversight Board Outside This Court

32. It is not clear that the Commonwealth Agent or, for that matter, the COFINA Agent, have been given the authority by their principal, the Oversight Board, to conduct litigation in the Supreme Court of Puerto Rico. The "Oversight Board has made it clear that the Committee is authorized to serve as [its agent for] purposes of the Commonwealth-COFINA dispute **only** . . . in accordance with the Stipulation and Order . . . ." *Opinion and Order Denying Motion of the Committee of Unsecured Creditors, as Agent for the Commonwealth, to Intervene* (Dein, Mag. J., Sept. 27, 2017) at 6 [Docket No. 416 in Adv. Proc. No. 17-00133 (LTS)]. And, as the Senior Bondholders have acknowledged, that Stipulation and Order contemplates that the Commonwealth-COFINA dispute will be resolved in this court, not in the Commonwealth courts.[17]

[17] *Objection of the COFINA Senior Bondholders' Coalition and National Public Finance Guarantee Corporation to the Urgent Motion of Official Committee of Unsecured Creditors, in its Capacity as Agent for Commonwealth of Puerto Rico, for Leave to Intervene under 11 U.S.C. §1109(b) and Bankruptcy Rule 7024* at 2 [Docket No. 377 in Adv. Proc. No. 17-00133 (LTS)]; *see also* COFINA Agent's Objection to Leave to Intervene at 5 [Docket No. 375 in Adv. Proc. No. 17-00133 (LTS)] (Commonwealth Agent's authority limited to COFINA-Commonwealth dispute, "an issue that should be—and will be—resolved by the Court").

33. The Stipulation neither gives expressly, nor implies that the Agents have been given, any power to litigate on behalf of the Oversight Board **outside** of this court. In fact, the document suggests the contrary. For example, the Stipulation and Order obligated the parties to submit to the court a schedule "constructed to enable **the Court** [*i.e.*, **this** court] to rule, on a final basis, on the Commonwealth-COFINA Dispute" by a date certain. Commonwealth-COFINA Dispute Stipulation at ¶4(e) (emphasis added). Neither that initial proposed schedule, nor any of the subsequent proposed schedules (submitted to extend the deadline), mentioned a detour to the Supreme Court of Puerto Rico to have local law issues decided, much less allowed sufficient time for that to occur. Because the Committee has authority to litigate on the Oversight Board's behalf "**only** [the extent it does so] in accordance with the Stipulation and Order," and because the Stipulation and Order provides that "**the Court** [will] rule, on a final basis, on the Commonwealth-COFINA Dispute," the Committee may not have authority to litigate the dispute in any court other than this one. And without the two parties most centrally affected by this dispute—the COFINA Agent and the Commonwealth Agent—Commonwealth court proceedings are simply not practically possible.

[*Remainder of page intentionally left blank.*]

WHEREFORE, for all of these reasons, the Commonwealth Agent respectfully requests that the court deny the Certification Motions.

Dated: April 11, 2018

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